UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JACENTA R. GRIFFIN,

Plaintiff,

v.

ANTHONY S. DELVECCHIO, SALVATORE V. AMATO, MICHAEL L. CIMINELLI, and CITY OF ROCHESTER,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS

Case No. 16-CV-6029 (CJS)

PRELIMINARY STATEMENT

On February 2, 2015, Rochester Police Officers Anthony Delvecchio and Salvatore Amato detained plaintiff Jacenta Griffin in response to plaintiff's mother's call to 911 requesting that plaintiff be transported to Rochester General Hospital for mental health treatment. Plaintiff alleges that, while *en route* to the hospital, Officers Delvecchio and Amato used excessive force against her. Plaintiff now brings suit against Officers Delvecchio and Amato, as well as Rochester Police Chief Michael Ciminelli and the City of Rochester, setting forth federal claims for excessive force, conspiracy to violate civil rights, supervisory and municipal liability, and state law claims for battery, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

Defendants move to dismiss the following claims: (1) conspiracy to violate civil rights; (2) municipal liability; (3) supervisory liability; (4) intentional infliction of emotional distress;

(5) negligent hiring, retention, and training; (6) negligence and negligent infliction of emotional distress.[1]

STATEMENT OF FACTS

The following facts are drawn from the complaint and are assumed to be true for purposes of this motion only. On February 2, 2015, plaintiff's mother called 911 requesting that her daughter be transported to Rochester General Hospital for mental health treatment. Officers Devecchio and Amato responded to this call, encountered plaintiff outside her residence, handcuffed her, placed in their police vehicle, and began to transport her to Rochester General Hospital. Plaintiff alleges that during this transport the officers stopped and exited their car, said aloud: "Is she gonna shut the fuck up? … no she isn't gonna shut up," then allegedly elbowed and punched causing her to pass out. Plaintiff claims to have awoken later, injured, in the hospital.

STANDARD FOR MOTION TO DISMISS

"In deciding whether to grant a motion to dismiss for failure to state a claim, the court must accept the factual allegations contained in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." *Foster v. Humane Soc'y of Rochester & Monroe County, Inc.*, 724 F. Supp. 2d 382, 388 (W.D.N.Y. 2010) (Larimer, J.). "At the same time, however, 'a plaintiff's obligation … requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.'" *Foster*, 724 F. Supp. 2d at 382 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)). "Thus, where a plaintiff 'has not nudged his claims across the line from

[1] Defendants do not move to dismiss the federal claims for excessive force against Officers Delvecchio and Amato, or the state law claims for assault and battery against these two officers.

conceivable to plausible, his complaint must be dismissed.'" *Id.* at 388 (quoting *Twombly,* 550 U.S. at 570). "A 'plausible' entitlement to relief exists when the allegations in the complaint move the plaintiff's claims across the line separating the 'conclusory' from the 'factual,' and the 'factually neutral' from the 'factually suggestive.'" *Id.*

ARGUMENT

I. The Claim for Conspiracy to Violate Civil Rights Should be Dismissed

Plaintiff alleges that the defendants Delvecchio and Amato, acting within the scope of their employment and under color of state law, conspired to deprive her of her constitutional rights. It is axiomatic, however, there can be "no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978). This Court has repeatedly dismissed conspiracy claims against officers of a single law enforcement entitle because such claims are barred by this intracorporate conspiracy doctrine. *See Sharp v. Town of Greece*, 09-CV-6452, 2010 U.S. Dist. LEXIS 42944, at *22 (W.D.N.Y. May 3, 2010) ("[T]he intracorporate conspiracy doctrine prevents claims against Police defendants. All are members of the Town of Greece Police Department.") (Telesca, J.); *Chaudhuri v. Green*, 689 F. Supp. 2d 438, 454 (W.D.N.Y. 2010) (dismissing conspiracy claims against two Ontario County deputy sheriffs as barred by the intracorporate conspiracy doctrine) (Siragusa, J.). Because Officers Delvecchio and Amato are both police officers alleged to have been acting in the scope of their employment, plaintiff's conspiracy claim fails.

II. The Claim(s)[2] for Municipal Liability Should Be Dismissed

To state a § 1983 claim against the City of Rochester plaintiff must plausibly allege that a City policy or custom caused a deprivation of her federal rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (U.S. 1978). Plaintiff does not allege that she was injured by any City policy. Rather, she claims to have been injured by the City's *failure* to train its police officers concerning "proper methods for the use of force, arrest procedures, and refraining from participating in conspiracies to violate constitutional rights," as well as a failure to adequately investigate allegations of excessive force and to discipline officers found to have used excessive force. *See* Complaint ¶ 60. In other words, plaintiff claims that she has been injured by the City's deliberate indifference to its internal training, investigation, and discipline concerning officers' use of excessive force.

The Supreme Court has recently reiterated that "deliberate indifference is a stringent standard of fault[.]" *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (quoting *Bd. of the County Comm'Rs v. Brown*, 520 U.S. 397, 410 (1997)). A claim for municipal liability is "at its most tenuous" when it is based upon a theory of deliberate indifference. *Id.* at 1359. For liability to attach on a deliberate indifference theory, plaintiff must establish (1) that the City was on notice of a defect in its training, investigative or disciplinary program, and consciously chose not to address that defect, and (2) the failure to address the defect caused plaintiff's injury. *Id.* at 1360. "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference[.]" *Id.* (internal quotations omitted).

Plaintiff alleges in the most conclusory terms that she was injured by the City's failure to adequately train officers, investigate allegations of excessive force, and discipline officers. Yet to plausibly plead this cause of action, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff must do more than simply allege that she was injured by unspecified inadequacies in the City's training, investigation or disciplinary systems—she must set forth facts which together plausibly allege that the City was on notice of such inadequacies and chose not to address them. Facts alleging a "pattern of similar constitutional violations by untrained employees is ordinarily necessary" to plausibly make such a showing. *Connick*, 131 S. Ct. at 1360. Indeed, the Second Circuit has long held that "[a] single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy." *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993). Yet plaintiff's complaint does just this, setting forth facts concerning only a single incident—her own. This is plainly insufficient to plausibly plead that policymakers were on notice of a flaw in their training, investigative, or disciplinary programs, and that the failure to address that flaw is what caused plaintiff's purported injury.

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[2] Plaintiff purports to set forth claims for municipal liability in both Counts III and V of the complaint (there is no Count IV in the complaint). Defendants seek to dismiss plaintiff's municipal liability claims as set forth under both of these "Counts."

Moreover, plaintiff does not—and cannot—allege that the City of Rochester failed to investigate her own complaints of misconduct against the defendant officers or refer to those complaints to the Civilian Review Board. This is because plaintiff's internal complaint concerning this incident *was* investigated, and *was* referred to the Civilian Review Board. As such, even plaintiff's own singular experience contradicts her conclusory allegations of deliberate indifference.

Plaintiff's claim for municipal liability must be dismissed.

III. The Claim for Supervisory Liability Should Be Dismissed

"Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (2009). The Second Circuit has set forth five ways in which a supervisor may be personally involved in an alleged deprivation of constitutional rights: (1) direct participation in the alleged constitutional violation; (2) failure to remedy the wrong after being informed of the violation by report or appeal; (3) creation or continuance of a policy or custom under which the unconstitutional practices occurred; (4) gross negligence in supervising the subordinates who committed the wrongful acts; or (5) deliberate indifference demonstrated by failure to act on information indicating that unconstitutional acts were occurring. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

As with her municipal liability claim, plaintiff's supervisory liability claim against Chief Ciminelli is entirely conclusory. She sets forth no facts establishing that the Chief (1) was directly involved in the violation of plaintiff's rights, (2) was made aware, by report or appeal, of the alleged violation, (3) created a policy which resulted in the alleged violation; (4) directly supervised Officers Delvecchio and Amato, let alone exhibited "gross negligence" in supervising them; or (5) was deliberately indifferent to the possibly that plaintiff would be harmed. Indeed, plaintiff seems to sue Chief Ciminelli only because he is the highest ranking member of the Rochester Police Department—but this is an insufficient basis upon which to establish liability. *See McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977) ("The fact that [the Corrections

Commissioner] was in a high position of authority is an insufficient basis for the imposition of personal liability.”).[3] Plaintiff’s claims against Chief Ciminelli fail.

IV. The Claim for Intentional Infliction of Emotional Distress Should be Dismissed

A claim for Intentional Infliction of Emotional Distress (“IIED”) “has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.” *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). The Court of Appeals has declared that “the requirements of the rule are rigorous, and difficult to satisfy.” *Id.* at 122. IIED has been, and remains, “highly disfavored” under New York law. *See Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 158 (2d Cir. 2014) (collecting cases).

New York public policy prohibits the bringing of IIED claims against governmental entities. *See Afifi v. City of New York*, 104 A.D.3d 712, 713 (N.Y. App. Div. 2d Dep't 2013) (“Public policy bars claims alleging intentional infliction of emotional distress against governmental entities.”); *Dillon v. City of New York*, 261 A.D.2d 34, 41 (N.Y. App. Div. 1st Dep't 1999) (“[C]laims of intentional infliction of emotional distress against government bodies are barred as a matter of public policy.”); *La Belle v. County of St. Lawrence*, 85 A.D.2d 759, 761 (N.Y. App. Div. 3d Dep't 1981) (“Further, defendants suggest that the causes of action for intentional infliction of emotional distress should be dismissed as a matter of law in light of this State’s public policy. We agree.”); *Howell v. County of Wayne*, 2012 N.Y. Misc. LEXIS 21, *2 (N.Y. Sup. Ct. Jan. 5, 2012)(“It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity.”)(citing *Laurer v. City of New York*, 240 A.D. 2d 543 (N.Y. App. Div. 2d Dep't 1997)).

[3] Because plaintiff’s claims for municipal liability and supervisory liability set forth in Count V of the Complaint fail, his request for declaratory relief related to that Count should also be dismissed.

Even if plaintiff's IIED claim weren't barred by public policy, it would still fail because the conduct alleged falls squarely into traditional tort claims of assault and battery. *See Fischer v. Maloney*, 43 N.Y.2d 553, 557-558 (1978) (dismissing IIED claim as "it may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process."); *Baliva v. State Farm Mut. Auto. Ins. Co.*, 286 A.D.2d 953, 954 (N.Y. App. Div. 4th Dep't 2001) (dismissing IIED claim because "such a cause of action does not lie where, as here, the conduct complained of falls well within the ambit of other traditional tort liability."); *Graham v City of New York*, 2015 N.Y. Misc. LEXIS 3356, *28 (N.Y. Sup. Ct., 12th J.D., Aug. 10, 2015) (dismissing IIED cause of action premised on same facts as claim for assault); *Thompson v Linares*, 2012 N.Y. Misc. LEXIS 5062, *12 (N.Y. Sup. Ct., 1st J.D., Oct. 22, 2012) (dismissing plaintiff's IIED claim which was "based on the same conduct underlying her assault and battery claims."); *Morton v McKenna*, 2011 N.Y. Misc. LEXIS 1616, *9 (N.Y. Sup. Ct., 3d J.D., Apr. 13, 2011) (dismissing IIED claims based upon facts which "sound in the traditional torts of assault and false imprisonment.").

In light of the foregoing, plaintiff's IIED claim should be dismissed.

V. The Negligent Hiring, Retention, and Training Claims Fail

Within plaintiff's second Count VIII, found on page 21 of the complaint,[4] plaintiff appears to set forth claims against the City of Rochester and Chief Ciminelli for negligent hiring, retention, training, and supervision of Officers Delvecchio and Amato. Such claims fail where the individual officers were acting within the scope of their employment and authority. *See Velez v. City of New York*, 730 F.3d 128, 136-137 (2d Cir. 2013) ("To maintain a claim against a

[4] The complaint contains two sections entitled "Count VIII" on pages 20 and 21.

municipal employer for the 'negligent hiring, training, and retention' of a tortfeasor under New York law, a plaintiff must show that the employee acted 'outside the scope of her employment.'"). Here, plaintiff explicitly alleges that Rochester Police Officer Delvecchio and Amato were acting in the scope of their employment at all times. Complaint ¶ 13. Accordingly, claims for negligent hiring, retention, training and supervision against the City of Rochester and Chief Ciminelli fail.

VI. The Claims for Negligence and Negligent Infliction of Emotional Distress Fail

Plaintiff sets forth claims for negligence and negligent infliction of emotional distress against defendant Delvecchio and Amato, yet she fails entirely to set forth any facts in the complaint supporting such claims. Rather, plaintiff alleges that the actions of Delvecchio and Amato resulting in her purported injury were intentional—that she was the victim of a purposeful assault and battery.

"New York has adopted the prevailing modern view that, once intentional offensive contact has been established, the actor is liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently. There is, properly speaking, no such thing as a negligent assault." *Mazzaferro v. Albany Motel Enterprises, Inc.*, 515 N.Y.S.2d 631, 632-633 (N.Y. App. Div. 3d Dep't 1987) (internal citations and quotations omitted). Here, plaintiff's pleading itself establishes that the only contact at issue is alleged to have been "intentional offensive contact." Plaintiff's factual pleadings do not support her claim for negligence, which must be dismissed.

Even if plaintiff had set forth facts to support a negligence theory in this matter, the claim would still fail as plaintiff has failed to allege that the defendants owed her any special duty. "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000). In negligence cases brought against municipal defendants, the New York Court of Appeals has "[t]ime and time again . . . required . . . that the damaged plaintiff be able to point the finger of responsibility at a defendant owing, *not a general duty to society, but a specific duty to him*." *Id.* (emphasis added). Such a special duty "is 'born of a special relationship between the plaintiff and the governmental entity.'" *McLean v. City of New York*, 12 N.Y.3d 194, 199 (2009) (quoting *Pelaez v. Seide*, 2 N.Y.3d 186, 198 (2004)). "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation." *Pelaez*, 2 N.Y.3d at 199-200.

No special relationship was formed between plaintiff and any municipal actor which would give rise to any special duty: plaintiff does not allege that she is a member of a class protected by a special statutory duty, and she does not claim that the defendants voluntarily assumed some duty to protect her. Indeed, the duty of care identified in Paragraph 113 of the complaint—"to act in a lawful manner and to not use excessive physical force on [plaintiff] while in [defendants'] custody"—is exactly that duty owed to the general public. This is an insufficient basis upon which to premise negligence liability against municipal actors. Accordingly, plaintiff's claims for negligence and for negligent infliction of emotional distress fail.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant their motion to dismiss, with prejudice, and provide such additional and further relief as the Court deems appropriate.

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